



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR: MICHAEL J. O'BRIEN, ASSOCIATE AREA COUNSEL,
SBSE

FROM: Joseph W. Clark
Chief, Branch 3 (Collection, Bankruptcy & Summonses)
CC:PA:CBS:Br3

SUBJECT: Your ref: CC:SB:6:OKL:GL-169244-01

LEGEND: None required.

This responds to your request for advice concerning the above-referenced taxpayer. This document is not to be cited as precedent.

ISSUE 1: Can a trustee-bank comply with the requirements of the Right to Financial Privacy Act (RFPA), U.S.C. 12 §§ 3401-3422, and voluntarily provide the Service with information identifying the beneficiaries to whom the taxpayer's revocable living trust distributed its assets?

CONCLUSION: The RFPA only restricts the Government's access to the financial records of individuals and partnerships of five or fewer individuals. It does not restrict the Government's access to a trust's financial records. Accordingly, the bank can voluntarily disclose the records of the trust's distributions. The Service need not seek these records by formally issuing a third-party summons to the bank.

ISSUE 2: If the bank requests a summons, [REDACTED], will those third-party summonses be subject to the notice requirements of I.R.C. § 7609(a) or will they be excepted from the notice provisions of I.R.C. § 7609(c)(2)(D)(i) or (ii)?

CONCLUSION: A summons served on the bank [REDACTED] is a collection summons under I.R.C.

§ 7609(c)(2)(D)(i). Therefore, that summons is exempt from the notice requirements of section 7609(a). However, a summons served [REDACTED] will not constitute a collection summons under section 7609(c)(2)(D)(i) or (ii). It will be subject to the notice requirement of section 7609(a).

FACTS:

The taxpayer established a revocable living trust (the trust) on [REDACTED], and transferred all of [REDACTED] real and personal property to it. [REDACTED] died on [REDACTED]. On the estate tax return, the trust property was valued at [REDACTED].

After the taxpayer died, the Service determined deficiencies in income taxes for [REDACTED] and [REDACTED] and issued a notice of deficiency to the estate. The Tax Court entered an agreed decision finding income tax deficiencies of [REDACTED] for [REDACTED] and [REDACTED] for [REDACTED], plus related penalties of [REDACTED]. The total balance owed for both years approximates [REDACTED]. The estate has no assets from which the taxpayer's [REDACTED] and [REDACTED] income tax liabilities can be paid.

The Service currently knows the specific assets the taxpayer transferred to the trust, [REDACTED]

LAW AND ANALYSIS:

Issue 1 The RFPFA, 12 U.S.C. §§ 3401-3422

In general, the RFPFA restricts the Government's access to "copies of, or the information contained in the financial records of any customer from a financial institution ... ", unless the Government obtains a subpoena, a summons, a search warrant, or the customer's written consent, or submits a formal written request that complies with certain procedural requirements. 12 U.S.C. § 3402. Anderson v. La Junta State Bank, 115 F.3d 756 (10th Cir. 1997). As emphasized in the preceding quotation, the RFPFA only restricts the Government's access to "customer" financial records. ^{1/} Customer is defined in section 3401(5) as:

^{1/} The Tenth Circuit's precedents govern this case because the trustee bank is located in [REDACTED]. In Neece v. United States, 922 F.2d 573 (10th Cir. 1990), the Tenth Circuit held that a bank violated the RFPFA when it voluntarily disclosed a customer's bank records to the Service. The court ruled that the bank could only reveal

[A]ny person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name. (Emphasis added).

"Person" is defined as "an individual or a partnership of five or fewer individuals." 12 U.S.C. § 3401(4). The Tenth Circuit has noted that "the most salient feature of the RFPA is the narrow scope of the entitlements it creates: by limiting the kinds of customers to whom the RFPA applies" Anderson v. La Junta State Bank, 115 F.3d 756, 758 (10th Cir. 1997). The narrow "customer"- "person" definitions reflect a Congressional balance of "the [bank] customers' right to privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations." Anderson v. La Junta State Bank, 115 F.3d 756, 758 (10th Cir. 1997). Notably, a trust is not included in related definitions of "customer" and "person."

Various courts have considered whether trusts are customers under the RFPA, and have concluded they are not. In Bradford v. McClellan, 98-1 U.S.T.C. ¶ 50,236 (W.D. N.C. 1997), the district court held that the RFPA does not apply to corporations or trusts. See also, In re Porras, 191 B.R. 357 (Bankr. W.D. Tex. 1995) (a trust is not a protected entity under the RFPA, and the trust lacked standing to invoke its protections against the Government's subpoena of the trust's financial documents), and Donovan v. U.A. Local 38 Plumbers and Pipe Trades Pension Fund of San Francisco, 569 F. Supp. 1488 (N.D. Cal. 1983) (the RFPA does not apply to the records of the pension fund trust). For analogous support, see Spa Flying Service v. United States, 724 95, 96 (4th Cir 1984) (the district court correctly dismissed the corporate appellant's case for failure to state a claim under the RFPA because that statute does not apply to corporations). Based on the foregoing precedents, we conclude that the RFPA does not extend protection to trusts and hence does not preclude the bank from voluntarily providing the Service with records of the trust's distributions.

Issue 2

If it becomes necessary to issue a third-party summons to the bank, we have considered whether the Service is obligated by I.R.C. § 7609(a) to give notice of that summons to the representative of the deceased taxpayer and to any other person identified in the description of summoned records. We have also considered this issue [REDACTED]

customer records to the Service when responding to a third-party summons. As discussed in this memorandum, the trust does not constitute a customer under the RFPA, thus the Neece ruling does not apply to this case.

[REDACTED] All of these possibilities require a careful analysis of the collection summons exception to the notice requirement of section 7609(a).

In general, section 7609(a) requires the Service to give notice of a third-party summons to the taxpayer being investigated and to every person identified in the description of summoned records. However, section 7609(c)(2) sets forth several exceptions to this notice requirement, including section 7609(c)(2)(D)(i) and (ii), which contains exceptions for certain collection summonses. Specifically, section 7609(c)(2)(D)(i) and (ii) excepts from the notice requirements those summonses that are:

Issued in aid of the collection of –

(i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued; or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i). (Emphasis added).

[REDACTED]

We are aware that some litigants have argued that a summons can only qualify as a collection summons if the Service's sole purpose for issuing it is to collect an assessed tax. [REDACTED]

2/

2/ [REDACTED]

The “sole purpose” issue was raised in cases dealing with the pre-RRA 1998 version of the collection summons exception that was codified at I.R.C. § 7609(c)(2)(B)(i). That provision excepted from the notice requirement those summonses issued “in aid of the collection of the liability of any person against whom an assessment has been made or judgment rendered.” Under this broader codification, the Service took the position that a summons served to determine if certain corporate officers were responsible for a trust fund recovery penalty constituted a collection summons under pre-RRA section 7609(c)(2)(B)(i) because it would ultimately aid in the collection of the corporation’s assessed withholding tax liability. In Barnhart v. United Penn Bank, 515 F. Supp. 1198 (M.D. Penn. 1981), the district court rejected the Government’s position because the summons was not issued solely for the purpose of collecting the assessed corporation’s liability. It was also issued to determine whether the corporate officers should be assessed as responsible persons under section 6672. Later courts rejected the result in Barnhart because it read a sole purpose requirement into the statute that was not provided by Congress. See Barnes v. United States, 199 F.3d 386 (7th Cir. 1999). Most importantly, the Tenth Circuit rejected this interpretation in Pflum v. United States, 97-2 U.S.T.C. ¶ 50,745 (10th Cir. 1997). However, this favorable case law must be viewed in conjunction with the RRA 1998 amendments to the collection exception.

RRA 1998 narrowed the collection summons exception by removing the reference to “the liability of any person against whom an assessment had been made” and replacing it with the phrase “an assessment made or judgment rendered against the person with respect to whose liability the summons is issued.” I.R.C. § 7609(c)(2)(D)(i). This amendment had the effect of removing the type of summons considered in Barnhart, e.g., a summons issued to determine whether certain corporate officers were liable as responsible persons under section 6672 for an assessed corporate employment taxes, from the collection summons exception. We note, however, that Congress did not insert a sole purpose requirement into this section, even though it could have and has done so with other exceptions. See I.R.C. § 7609(c)(2)(C) which excepts from the notice provisions those summonses “issued solely to determine whether or not records of the business transactions or affairs of an identified person have been made or kept.”

[REDACTED]

As alluded to in the foregoing discussion, if the Service issues a third-party summons [REDACTED], that summons will not qualify as a collection summons under I.R.C. § 7609(c)(2)(D)(i) or (ii). [REDACTED]

[REDACTED]

If you have questions or comments, please call (202) 622-3630.